IN THE COURT OF APPEALS OF IOWA

No. 8-261 / 97-07

DAVIS, JONES LAMB INSURANCE AGENCY, INC.,

Plaintiff-Appellee,

vs.

MED JAMES, INC.,

Defendant-Appellant.

FILED
SEP 30 1998

Appeal from the Iowa District Court for Linn County, Patrick R. Grady, Judge.

Defendant, a managing general insurance agency, appeals from a district court judgment entered upon a jury verdict in favor of plaintiff. **REVERSED AND REMANDED FOR ENTRY OF JUDGMENT FOR DEFENDANT.**

Mark Seidl of Seidl & Chicchelly, Marion, and J. Franklin Hummer of Davis, Unrein, Hummer, McCallister & Buck, L.L.P., Topeka, Kansas, for appellant.

Patrick M. Roby and Christopher L. Bruns of Elderkin & Pirnie, P.L.C., Cedar Rapids, for appellee.

Heard by Cady, C.J., Vogel, J., and Habhab, S.J.*
*Senior judge assigned by order pursuant to Iowa Code § 602.9206 (1997).

CADY, C.J.

Med James, Inc., a managing general insurance agency, appeals the district court judgment entered upon a jury verdict in favor of Davis, Jones Lamb Insurance Agency, Inc. (DJL). Med James claims insufficient evidence existed to support the jury verdict. It also maintains the district court erred by overruling its motions for summary judgment and directed verdict, and by failing to submit a particular jury instruction. We reverse the decision of the district court.

This case involves a dispute over the manner a managing insurance agency processed a request for increased flood insurance coverage from an insurance agency. DJL is an insurance agency that sells flood insurance to the public. DJL obtains the flood insurance from Med James. Med James is an agent of American Bankers Insurance Group (American Bankers). Med James processes applications, issues rate quotations, and completes acceptance of flood insurance policies on behalf of American Bankers. American Bankers is a "write-your-own company" authorized to offer flood insurance pursuant to the National Flood Insurance Program. Any claims stemming from flood insurance are referred to American Bankers.

On July 14, 1993, DJL requested an increase in flood insurance benefits from $5,900 to $25,000 on a building and from $19,500 to $50,000 on the contents of the building on behalf of Barron Motor Supply (Barron Motor), its client. The request was made to Med James by sending Med James a written memorandum. No premium payment was included with the request. Med James did not respond to the request.

Due to the barrage of claims and insurance requests resulting from the widespread flooding in the Midwest at the time, Med James was weeks behind in opening its mail.

On August 9, 1993, the flood engulfed the building on which Barron Motors had sought to increase coverage. DJL consequently paid Barron Motor the full amount of the policy. DJL in turn brought a negligence action against Med James for $49,600, the difference between the original policy limits and the requested increase. A jury returned a verdict finding Med James at fault and awarded DJL damages of $49,600.

On appeal Med James claims: (1) the jury verdict is not supported by substantial evidence; (2) the district court erred by overruling Med James' motions for summary judgment and directed verdict; and (3) the district court erred in refusing to give a particular jury instruction.

We review a summary judgment ruling for errors at law. *Iowa Comprehensive Petroleum Underground Storage Tank Fund Bd. v. Farmland Mut. Ins. Co.*, 568 N.W.2d 815, 817 (Iowa 1997). Summary judgment may be entered if the record shows "no genuine issue as to any material fact and ... the moving party is entitled to judgment as a matter of law." *Id.;* Iowa R. Civ. P. 237(c). Thus, we must determine whether a genuine issue of material fact exists and whether the court correctly applied the law. *Schuver v. E.I. Du Pont de Nemours & Co. (Inc.),* 546 N.W.2d 610, 612 (Iowa 1996). We view the facts in the light most favorable to the party opposing the

motion for summary judgment. *Shriver v. City of Okoboji,* 567 N.W.2d 397, 400 (Iowa 1997). When the conflict in the record concerns only the legal consequences flowing from undisputed facts, entry of summary judgment is proper. *Thompson v. City of Des Moines*, 564 N.W.2d 839, 841 (Iowa 1997).

As with summary judgment, we review a motion for a directed verdict for errors at law, giving the nonmoving party every legitimate inference that reasonably can be deduced from the evidence. *Smith v. CRST Int'l, Inc.*, 553 N.W.2d 890, 893 (Iowa 1996) (quoting *Dickerson v. Mertz,* 547 N.W.2d 208, 212 (Iowa 1996)). To grant a directed verdict, a trial court must find the evidence is insufficient as a matter of law to sustain the allegations brought. *Timm v. Clement,* 574 N.W.2d 368, 371 (Iowa App. 1997).

It is a fundamental principle of tort law that a wrongdoer must owe a duty of care to an injured party before the law will permit redress against the wrongdoer for a claimed wrong. *Kelly v. Sinclair Oil Corp.,* 476 N.W.2d 341, 354 (Iowa 1991); *Engstrom v. State,* 461 N.W.2d 309, 315 (Iowa 1990). The source of this duty can be found in statutes or judicial decisions. *Engstrom*, 461 N.W.2d at 315. It may also be created by contract. *See Amco Ins. Co. v. Stammer,* 411 N.W.2d 709, 713 (Iowa App. 1987).

Med James claims it owed DJL no duty to timely open its mail or notify it of any shortcomings in its application. Specifically, it maintains DJL's agents were responsible for understanding the law behind the National Flood Insurance Program

requiring the submission of payment with an application for increased coverage. It further asserts no custom existed between the parties supporting DJL's contention that Med James had a duty to advise it of the procedure for obtaining increased coverage. In addition, Med James contends there is no causal connection between the untimely opening of mail and DJL's losses because if DJL had sent payment with a proper application, the coverage would have been in effect regardless of whether Med James opened its mail.

DJL, conversely, maintains Med James was negligent by failing to respond to its request for increased coverage and point out the problems with its request. Specifically, it claims it used Med James' services because it lacked expertise in the flood insurance area. It further claims it routinely requested increases in insurance coverage through specialty brokers such as Med James by sending them a memo, and if it failed to properly request coverage, the broker customarily faxed them instructions to take the appropriate steps to obtain coverage.

We first turn to the federal statutes and regulations to determine whether Med James had a duty to respond to and point out the defects in DJL's request for increased coverage. The Federal Emergency Management Agency (FEMA) administers the National Flood Insurance Program (Program). 42 U.S.C. § 4011 (1995). The Program allows the authorization of write-your-own companies. 44 C.F.R. § 62.23 (1992). These companies are private sector insurance companies authorized to issue flood insurance pursuant to the Program. *Id.* § 62.23(c). When

not contrary to the regulations, write-your-own companies authorized to offer flood insurance under the Program may offer the insurance pursuant to their customary business practices, including their usual arrangements with agents. *Id.* § 62.23(a), (e).

The Program, however, provides the specific standards and terms for participating insurance companies. *See, e.g., Smith v. National Flood Ins. Program,* 796 F.2d 90, 93 (5th Cir. 1986) (holding where regulation expressly provided for timeliness of mail service, agent's failure to use certified mail was negligent). In particular, when added coverage is sought, the increase becomes effective at "12:01 a.m. ...on the 5th calendar day after the application date and the presentment of payment of premium." 44 C.F.R. § 61.11(c) (1992). The new premium for additional coverage is then calculated pro rata in accordance with the current rates. *Id.* § 61.11(d). If a write-your-own company rejects an application from an agent, the agent should be notified so that the business can go through another company. *Id.* § 62.23(h)(5).

Med James is an agent of American Bankers, and, accordingly, was obligated to follow the write-your-own company regulations. The regulations clearly do not impose a duty upon a write-your-own company to accept an inadequate application. Thus, Med James had no duty to accept DJL's incomplete application. The question whether Med James had a duty to respond to DJL's application and explain the procedure for increased coverage remains. We must therefore turn to the law of customary business practices to determine whether such a duty exists.

Whether a duty exists to impose an obligation on a defendant to conform to a standard of care for the benefit of the plaintiff is an issue of law for courts to resolve. *Greatbatch v. Metropolitan Federal Bank*, 534 N.W.2d 115, 116 (Iowa App. 1995). Our cases recognize conformity to custom or the lack thereof may, in some situations, be evidence of negligence. *See Simon's Feed Store, Inc. v. Leslein*, 478 N.W.2d 598, 602 (Iowa 1991) (holding trial court should not have given jury instruction concerning nonconformity to custom as evidence of negligence absent showing that design criteria applicable to bridges on public highways constituted custom generally followed in designing bridges on privately owned roadways).

In the context of insurance, course of dealing or custom may establish a duty between an insurer and the insured. *See Laverty v. Hawkeye Sec. Ins. Co.*, 258 Iowa 717, 724, 140 N.W.2d 83, 87 (1966) (holding insurer established implied contract by custom which permitted delayed payment of premiums upon which insured relied and insurer was estopped to deny coverage on basis of lapse of policy for delinquent payment); 44 Am. Jur. 2d *Insurance* § 1658 (1982) (insurer is estopped from denying coverage because of overdue premiums when overdue premiums are customarily accepted); *but see Servicemaster v. Gab Business Services, Inc.*, 544 N.W.2d 302, 307 (Minn. 1996) (stating industry custom is important in establishing a standard of care, but does not establish a legal duty). A custom, however, requires more than unrelated acts or forgiveness of an occasional delinquency. 44 Am. Jur. 2d *Insurance* § 1659 (1982). Instead, to establish a duty based upon custom in a situation where

a premium has not been paid there must be: (1) some course of dealing in accepting overdue payments amounting to a custom or habit; (2) the insured was justified in believing the insurer would not insist on a forfeiture for past failures to timely pay based upon the custom; (3) the insured believed it could postpone payment of premiums without risking a forfeiture; and (4) insured acted on this belief did not pay the premium at maturity. *Id.*

A DJL representative testified DJL did relatively little work with flood insurance, and prior to August 1993 she had filled out and sent to Med James only one application for flood insurance. Additionally, the increase in coverage it sought for Barron Motors was the first such increase it had requested from Med James.

Betty Fields, a Med James representative, testified concerning the procedure it follows when a request for an increase in coverage arrives without a check. She explained Med James typically advises the agent it must receive a check before the application can be processed.

While an industry custom may in some instances support a duty of care, in this case the standards of the National Flood Insurance Program clearly define the limits and requirements for an effective increase in flood insurance. A DJL representative testified she routinely dealt with companies that would increase insurance based upon a memorandum regardless of whether payment was submitted with the application. The regulations governing the National Flood Insurance Program, however, do not allow this. DJL knew this program had stringent requirements and, accordingly, was

not justified in assuming other insurance practices would necessarily apply to the program. Furthermore, DJL had a copy of the manual stating the rules governing the program. Therefore, as a matter of law, Med James owed DJL no duty to explain the deficiency in its application. Accordingly, we find the district court erred by failing to grant Med James' motion for summary judgment and in submitting the issue to the jury.

REVERSED AND REMANDED FOR ENTRY OF JUDGMENT FOR DEFENDANT.